No. 83-1014

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

MARK BLUMENTHAL,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Illinois

BRIEF FOR RESPONDENT IN OPPOSITION

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To the Chief Justice and Associate Justices of the Supreme Court of the United States:

The respondent asks this Court to deny the petition for writ of certiorari to review the judgment of the Appellate Court, Fourth District, because petitioner does not present an issue worthy of review by this Court.

OPINION BELOW

The petitioner seeks review from an Illinois Appellate Court, Fourth District, opinion in *People v. Blumenthal*, No. 4-82-0567 (4th Dist. 1983). A copy of the opinion is included with petitioner's petition. The petitioner's petition for leave to appeal to the Supreme Court was denied October 4, 1983.

JURISDICTION

The jurisdictional requisites are set forth in the petition. However, the following argument makes clear that the petitioner has not shown any reason for this Court to exercise its discretion to grant the Petition for Writ of Certiorari.

STATEMENT OF FACTS

The following facts are from the Illinois Appellate Court opinion:

The facts of this case are so extraordinary as to be grotesque. Petitioner and his girlfriend, now his wife, were students at Illinois State University and lived in the same dormitory which housed about 800 students. Some other inhabitants of the building had obtained some of the girlfriend's clothing, presumably as a joke, and refused to return it. Various contretemps ensued, including a note given to the girlfriend, which, she testified, upset her. The contents of the note were not revealed.

Petitioner became involved by reason of his relationship with her, and having become satisfied in his own mind as to who the culprit was, determined to create an explosion outside the dormitory room occupied by that offender. To this end, he obtained an aerosol can and some gasoline. He placed the can outside the door of the room, poured gasoline into the carpet surrounding it, and ignited the gasoline. All this occurred about 5 a.m. on October 27, 1981.

The ensuing brouhaha was apparently all that defendant anticipated and more. One occupant of the room, in attempting to escape the fire, was burned about the feet, and the damage to the building and its furnishings was $2,249.83.

After the fire was extinguished, the police who had been summoned to the scene learned of the smell of gasoline in the washroom on the floor of the dormitory where the defendant's room was located. In addition, while inter-

viewing persons at the scene, police were told by defendant's roommate that "I think he (Blumenthal) might have done it." Petitioner denied to the police that he had set the fire and refused permission to search his room. The police claimed to have become aware of the "feud" during the on-scene investigation, but it was specifically denied by the defendant.

About noontime on October 27 the police obtained a search warrant for the washroom and for the defendant's room. It appears that each room on the floor has a locker in the washroom. The washroom was searched first and a can half-filled with gasoline was found in locker #856. Petitioner's fingerprints were ultimately found on this can. Petitioner's room was next searched and a computer card with the handwritten legend "856" was discovered. Petitioner was then arrested.

Some brief background may be helpful in understanding the matter of the computer card. Petitioner's roommate testified that during the evening before the fire at about 9:30 p.m. he called the defendant by telephone to complain about the can of gasoline which was in their room and which was giving off noxious odors. Petitioner was in his girlfriend's room at the time and instructed the roommate to remove the can and place it in an empty locker on the washroom. He did so, placing the can in locker #856A; he then returned to the room and wrote "856" on a computer card and left the card on the defendant's desk.

Petitioner filed two motions: first, to quash the search warrant and to suppress the evidence seized thereby; second, to suppress the evidence seized as an incident to defendant's arrest and to quash the arrest. The trial court allowed the motion to suppress the search and the evi-

dence seized thereby as to defendant's room, but not as to the washroom; it also denied the motion to quash the arrest and any fingerprints or photographs taken incident to the arrest. The trial court found that there was probable cause to search the washroom, but that there was no substantiated information regarding the "feud" and therefore the search of defendant's room was without probable cause.

The linchpin to the entire issue related to the testimony of an officer at the motion to quash arrest. He stated that the finding of the computer card in defendant's room with the legend #856 which corresponded with the locker number in which the gasoline can was found persuaded him to make the arrest.

The appellate court found that, notwithstanding the officer's subjective belief about the presence of probable cause, there was sufficient other evidence to create probable cause to arrest defendant. When the officer applied for the search warrant he possessed the evidence of the roommate's statement, the evidence of the feud, the confrontation with the defendant about this evidence which defendant denied, and information about the gasoline odor emanating from a washroom about 40 feet from the defendant's room. The totality of this evidence created a basis for probable cause and rendered the arrest valid.

REASONS FOR DENYING THE WRIT

There is no reason for this Court to review the decision below. The issue was correctly decided by the Appellate Court of Illinois and does not present the kind of novel or pressing problem worthy of review by this Court.

With warrant in hand, the police searched petitioner's Illinois State University dormroom and the washroom down the hall; during the search they arrested the petitioner. Before trial, petitioner moved to quash the searches and the arrest and suppress any evidentiary fruits obtained therefrom.

It is not exactly clear from the petition just what the fruits were here or how they were disovered. The appellate court opinion is more helpful in this matter. (Appellate Opinion, petition at 85-86). The search of the washroom turned up an incriminating can half-filled with gasoline in locker #856 and petitioner's fingerprints which were ultimately found on the can. The search of the dormroom turned up a computer card with the handwritten legend "856", but this was never used against petitioner. The arrest resulted in incriminating fingerprints taken incident to arrest.

The trial court quashed the warrant to search his dormroom and suppressed the fruits of this search, but approved of the search of the washroom and the petitioner's arrest and permitted the evidence obtained from these to be introduced as evidence against petitioner. The appellate court also upheld the arrest and washroom search.

Petitioner's argument seems to be as follows: since the police were inside the dormroom pursuant to a search

warrant when they arrested petitioner, and since that search warrant was later held invalid, in theory the police should be deemed as standing outside the dormroom without an arrest warrant and without petitioner's consent to enter and without exigent circumstances—thus without a basis for arrest or for using the fruits of the arrest against him. According to petitioner, this violates this Court's ruling in *Payton v. New York*, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980) (warrantless, nonconsensual entry into suspect's home to make routine felony arrest violates Fourth Amendment), as well as Illinois's own rulings in *People v. Abney*, 81 Ill.2d 159, 407 N.E.2d 543 (1980) and *People v. Eichelberger*, 91 Ill.2d 359, 438 N.E.2d 140 (1982), which follow *Payton*.

The trouble with this claim is that it misapprehends what happened in the Illinois Appellate Court. The appellate court's analysis made clear that the application for search warrant and the neutral magistrate's subsequent decision to issue the warrant satisfied this Court's concern underlying *Payton*. Here we had a determination by a neutral magistrate, thus satisfying *Payton*'s legal requirement. And we had the actual existence of probable cause to arrest, thus satisfying *Payton*'s factual requirement.

The appellate court reasoned that at the time the officers sought the neutral magistrate's determination of probable cause, there existed probable cause sufficient to effectuate an arrest. This was evidenced by the application for warrant, (contained in petition at 45). This case is distinguishable from instances where the police feel evidence will be found at some specific locale without yet being sure who committed the crime. Rather, the application for warrant makes clear that the police felt petitioner

Mark Blumenthal committed the arson and this was the reason why they requested permission to search his dormroom. It was on this application and on this basis that the warrant was granted.

Before trial, the warrant to search was quashed. Later on appeal, the appellate court was not asked to address whether this search warrant was properly quashed. But it was asked to address whether the arrest was valid and the court deemed the arrest valid on the basis of the application by the police officers. In holding that the application to the neutral magistrate supported the warrant, the appellate court relied on the following evidence contained on that application: 1) the petitioner's roommate's statement to the police that "I think he [Blumenthal] might have done it," 2) the officer's confrontation of the petitioner with the information about the "feud", providing the police the opportunity to view petitioner's reaction to the information, including petitioner's denial, 3) the information that a smell of gasoline was coming from a washroom on the floor of the dormitory where petitioner's room was located, turning out to lie just 40 feet from petitioner's dormroom. Thus "the totality of the circumstances as recited in the application and known to the officer at the time of the arrest" was sufficient to justify the arrest. (Appellate Opinion, petition at 90).

It becomes clear then that implicitly the appellate court found that the warrant to search had been validly issued in the first place. The court was not explicit about this because that question was not directly presented. But this conclusion is the only logical one—the court could not logically hold on the facts of this case that there was probable cause that petitioner committed the crime but no probable cause to permit a search of his dormroom.

This logic supports what the appellate court did make explicit—that the arrest was not tainted by any illegal search.

Thus there is no *Payton* problem. The police first went to a neutral magistrate to secure a warrant. They obtained a warrant on facts sufficiently demonstrating probable cause to arrest petitioner. Thus they complied with *Payton*'s requirement "to interpose the magistrate's determination of probable cause between the zealous officer and the citizen" before making an arrest. *Payton*, 445 U.S. at 602. Indeed, in *Payton*, this Court remarked that "an arrest warrant requirement may afford less protection than a search warrant requirement." *Payton*, 445 U.S. at 602. In light of the appellate court's ruling, it is apparent that petitioner had the benefit of the greater protection.

Since there is no violation of *Payton* and since there is nothing this Court could add to the *Payton* rule if it were to take review of this case, the petition should be denied.

CONCLUSION

WHEREFORE, the People of the State of Illinois ask this Court to deny the petition because the issue it presents is not worthy of review by this Court.

Respectfully submitted,

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